

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

PUBLIX WAREHOUSE, INC.,)

Petitioner,)

vs.)

NATIONAL LABOR RELATIONS BOARD,)

Respondent.)

FEB 21 1969

Docket No. 22280

REPLY BRIEF OF PETITIONER

DATE: May 10, 1968

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FILED

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REPLY BRIEF OF PETITIONER

Petitioner replies to the Brief filed by the Respondent as follows. Petitioner will attempt to maintain the same paragraph headings as stated in the Respondent's Argument.

I. It is not proper for the Board to assert Jurisdiction over the Company's Business.

A. The existence of statutory jurisdiction is not certain.

As noted on Page 8 of Petitioner's Brief, the employees are paid with Petitioner's checks for work performed for Superior Shipper's Association, Inc. (Superior), but Petitioner does not derive any profit. (TR-89). Petitioner paid out for the benefit of Superior which may be characterized as an advance, the amount of \$118,166.91, of which payroll to employees was \$81,985.46. (TR-89). While the employees are carried on Petitioner's payroll records the arrangement is solely for the convenience of Superior, a non-profit organization, which actually is responsible for the payroll.

B. The Company does not meet the Board's self-imposed jurisdictional standards.

The Respondent continues to subvert the fact that the

any basis for finding that the Petitioner meets one of the Board's jurisdictional standards is the funds derived from a non-profit shipper's cooperative association which does not meet the Board's standards for jurisdiction.

Most of the cases cited by the Respondent on Page 10 of its Brief are not applicable since the services performed by the subject companies were performed in interstate services that brought those companies within the Board's jurisdiction. We have consistently maintained that in this case the only basis for exercising jurisdiction over the Petitioner would depend on services performed for a company which the Board could not find jurisdiction.

The Respondent accuses us of misreading the Mid-West Pool Car Ass'n, Inc., 114 NLRB 721. We leave it to this Court to read the case. In Mid-West, the Board stated that operations of non-profit organizations formed for purpose of having merchandise loaded on freight cars for its members and distributing it to them upon arrival do not have sufficient impact upon interstate commerce to justify assertion of jurisdiction. The way Petitioner reads this case, it was not directed specifically to the operations of Mid-West, but was a general statement of the Board upon which other parties would rely. To exercise jurisdiction over one company basing its jurisdiction on operations performed for a shipper's co-op, and then in the Mid-West case saying that such operations do not affect commerce would unjustly discriminate against Petitioner under the theory set forth in National Labor Relations Board v. W. B. Jones Lumber Co., 245 F.2d 388, 391. In that case this Court stated that the issue of jurisdiction would be justiciable if unjust

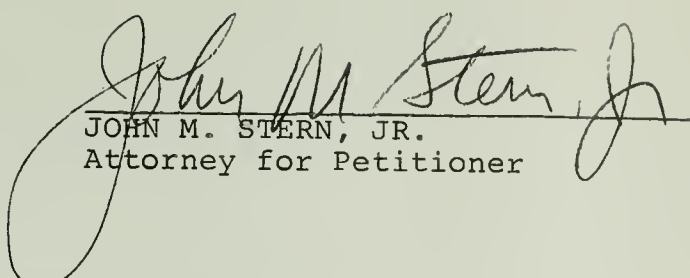
discrimination were involved in the consideration of one case and refusal to hear others unfair or lacking in due process.

We submit that Petitioner and other companies should be able to rely on standards set by the Board such as in the Mid-West case where such standards are made applicable to an entire industry. Otherwise, we have a system of one-way law, and the jurisdictional standards set by the Board for industry really have no meaning. In the instant case, the Board has not set forth any findings which justify a departure from the standards set forth in the Mid-West case. Mid-West is indeed applicable because the only way the Board can exercise jurisdiction over the Petitioner is through its activities for a non-profit pool car association.

In addition, the Petitioner stands on its assertions made on Pages 9 and 10 of its Brief and the Board's Argument on Page 11 of its Brief contains no law to contradict the Petitioner's Petition. Our contention is that the first alternative standard for asserting jurisdiction - a gross of \$50,000 or more per year from interstate operations - should not take into consideration the business done by a so-called "link" in interstate commerce if the "chain" of commerce would not justify the Board's jurisdiction. We reiterate: If the transportation of the freight in interstate commerce by Superior for its own members is not felt to be important enough for the Board to exercise jurisdiction, how can the service of Petitioner be an essential link to that commerce.

and the Complaint dismissed.

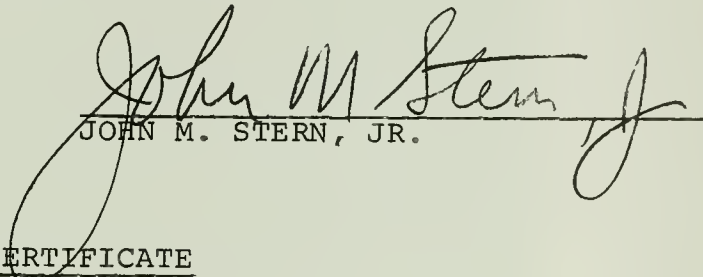
DATED at Anchorage, Alaska, May 10, 1968.


JOHN M. STERN, JR.
Attorney for Petitioner

CERTIFICATE OF SERVICE

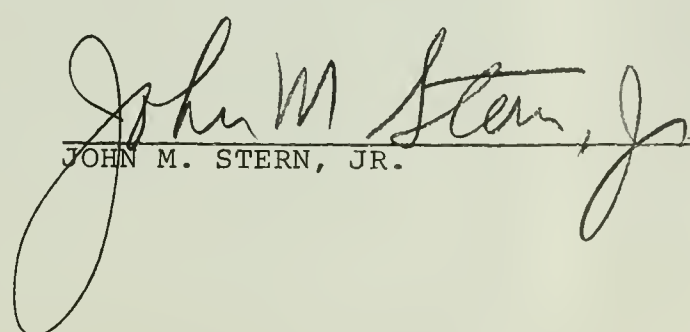
I hereby certify that I have this day served a copy of the foregoing document upon all parties to the above proceeding, by mailing copies thereof to them, or their attorneys, properly addressed with postage prepaid.

DATED at Anchorage, Alaska, May 10, 1968.


JOHN M. STERN, JR.

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.


JOHN M. STERN, JR.

